

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0045 BLA

MARIE HOWELL)
(Widow of LESLIE HOWELL))
)
Claimant-Respondent)
)
v.)
)
LODESTAR ENERGY, INCORPORATED)
) DATE ISSUED: 09/22/2016
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Attorney Fee Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Stanley S. Dawson (Fulton & Devlin, LLC), Louisville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Attorney Fee Order (2012-BLA-05919) of Administrative Law Judge Joseph E. Kane, granting an attorney's fee in connection with a survivor's claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant's counsel requested attorneys' fees and expenses totaling \$3,292.13. After considering employer's objections, including that the award was premature, the administrative law judge awarded the requested fee and costs in full, for a total award of \$3,292.13.

On appeal, employer contends that the administrative law judge's award of attorneys' fees was premature since this claim is pending before the Board on appeal. Claimant's counsel responds in support of the administrative law judge's attorneys' fee award. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The amount of an award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer does not challenge the amount of the fee awarded by the administrative law judge, but contends that the administrative law judge erred in addressing the fee petition when employer's appeal of the benefits award was pending before the Board. Brief in Support of Employer's Appeal at 1.

Contrary to employer's contention, an attorney's fee may be approved pending a final award of benefits; the fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995). Thus, the administrative law judge did not err in issuing a fee award. Moreover, because we have affirmed the administrative law judge's award of survivor's benefits, *see Howell v. Lodestar Energy, Inc.*, BRB Nos. 15-0216 BLA and 15-0218 BLA (Mar. 24, 2016) (unpub.), employer's argument before the Board is moot.

¹ In a Decision and Order dated February 24, 2015, the administrative law judge awarded claimant survivor's benefits. The Board subsequently affirmed the administrative law judge's award of survivor's benefits. *Howell v. Lodestar Energy, Inc.*, BRB Nos. 15-0216 BLA and 15-0218 BLA (Mar. 24, 2016) (unpub.).

Accordingly, the administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge